IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-516

LUCIO P. SALVUCCI,

Petitioner,

v.

THE NEW YORK STATE RACING ASSN., INC., NEW YORK CITY OFF-TRACK BETTING CORP., ROOSEVELT RACEWAY, INC.; and JOSEPH A. GIMMA, AS HE IS CHAIRMAN OF THE NEW YORK STATE RACING COMMISSION,

Respondents.

BRIEF OF RESPONDENT NEW YORK CITY OFF-TRACK BETTING CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Were petitioner's ideas with respect to a particular method of betting, which ideas he had registered in the Office of the Register of Copyrights, copyrightable material?

STATEMENT OF THE CASE

(1)

Complaint:

This action was commenced pursuant to the United States Copyright Laws, §17 U.S.C. 101, et seq. (3).* The complaint alleges four counts of copyright infringement; each separately directed against one of the defendants (4-7). Prior to March 30, 1962, the plaintiff "put into words a creative expression of exotic wagering on horses or dogs entitled Tri-3 and Tri-3 double" (1).

TRI-3 is a "3 finish position play or wager on horses or dogs" where the object is to select correctly all finish positions, starting with the first, chosen finish po-

*Unless otherwise indicated, numbers not preceded by A in parentheses refer to pages in the Appellant's Appendix in the Court of Appeals. Numbers preceded by A refer to pages in the Appendix attached to the Petition for Writ of Certiorari.

sition of the bettor's TRI-3 ticket. If no one selects all three finish positions correctly, then the person getting the most consecutive correct finish positions starting with their first chosen finish position of their TRI-3 ticket is the winner (15).

TRI-3 Double "is a finish position play or wager consisting of positions 1, 2 and 3 in 2 races on horses or dogs" (12). The object is the same as TRI-3 except that the bettor must select correctly in both races (12). Winning tickets with the correct first three chosen positions for the first race must be exchanged by the bettor for selections in the second race (12).

Between March 30 and April 2, the plaintiff registered Tri-3 Double and Tri-3 as copyrighted works in the Office of the Registe of Copyrights (4, 10-12, 13-15).

After registering Tri-3 a[illegible] Tri-3

Double, the plaintiff presented his idea to each of the defendants (2-6). Thereafter, each of the defendants "infringed said copyright by using a material appropriation of plaintiff's sequential order of finish entitled Big Triple and Triple" (4, 16). The complaint also alleged that the defendants had engaged in unfair trade practices and unfair competition (id.). The complaint sought injunctive relief and damages (6-7).

Motions to dismiss and summary judgment

On August 22, 1975, the New York City Off-Track Betting Corporation filed an answer (17-19). On October 10, Roosevelt Raceway, Inc., joined issue (20-26).

On November 7, Roosevelt Raceway, Inc., moved to dismiss the complaint and for summary judgment. In support of the motion, George Levy, President of Roosevelt, submitted an affidavit. Roosevelt offers three

types of wagers: regular win, place and show selections; the "EXACTA", in which the bettor wins by selecting the horses in their exact order of first and second place positions and the "Triple" or Big Triple" by which the bettor wins by selecting the first, second and third horses in their exact order of finish (29-30, 33). The "EXACTA" was begun at Roosevelt on July 15, 1965 and the "Triple" or "Big Triple" was started on March 3, 1971 (30).

Mr. Levy stated that the "Triple" or "Big Triple" was an extension of the "EXACTA" (30). Roosevelt Raceway has never offered forms of wagering known as "TRI-3" and "TRI-3 Double" (30-31).

On November 7, The New York State Racing Association, moved for summary judgment (29). In support of the motion, Patrick W. O'Brien, Vice President of Operations of the

New York State Racing Association (NYRA), submitted an affidavit. NYRA, incorporated pursuant to Section 7902 of Title 21 of the Unconsolidated Laws of the State of New York, operates thoroughbred racing at Aqueduct, Belmont Park and Saratoga (52). The NYRA is supervised by the New York State Racing and Wagering Board (Board) (53). The Board regulates the use and conduct of parimutuel wagering in New York (53). The Board issues licenses to racing associations, corporations and publicly created off-track betting corporations (53). Only the forms of wagering approved by the Board can be used by its licensees (53). The Board has approved eight types of wagers, which include the "DAILY DOUBLE", the "EXACTA" and the TRIPLE (also called the Trifecta) (53-54). The types of wagers are set forth in the New York Code of Rules and Regulations,

volume 9(D), Subtitle T, Part 4011 and Part 4122 (58-74). The TRIPLE was authorized for thoroughbred racing on August 28, 1973, and for harness tracks on March 1, 1971 (54).

Mr. O'Brien stated that versions of the TRIPLE have been used in France since 1954 (55, 78, 80). Mr. O'Brien also stated that NYRA has never described the TRIPLE in the language utilized by plaintiff to describe his "TRI-3" or in any similar language (56).

On November 7, 1975, Joseph Gimma, Chairman of the New York State Racing Commission, also moved to dismiss or for summary judgment.

(2)

The District Court dismissed the complaint. It stated (A3a-5a):

"Pari-mutuel betting is controlled by statute in New York State-N.Y. Unconsoli-

dated Laws, §§7952, 7954 and 8008. Methods of betting at authorized establishments are sanctioned by the New York State Racing and Control Board. In addition to convencional betting at thoroughbred and harness race tracks, the Board has approved the Daily Double, Quinella, Exacta, Trifecta (sometimes called the Triple), and Superfecta.

The method of betting is not copyrightable. Novel and useful ideas may attain patent protection, but not copyright protection. In Baker v. Selden, 101 U.S. 99 (1880), plaintiff obtained a copyright on a book explaining a system of bookkeeping. The court dismissed the claimed copyright infringement noting:

> There is no doubt that a work on the subject of bookkeeping though only explanatory of well known systems, may be the subject of a copyright; but, then, it is claimed only as a book.... The novelty of the art or thing described or ex-

> plained has nothing to do with the validity of the copyright....
>
> ...The copyright of a book on bookkeeping cannot secure the exclusive right to make, sell and use account books prepared upon a plan set forth in such book.... 101 U.S. at 101-02, 104.

It is the manner of expression and not the idea itself which is copyrightable. L. Batlin & Son, Inc. v. Jeffrey Snyder, d/b/a J.S.N.Y. and Etna Products Co., Inc., No. 75-7308 (2d Cir. October 24, 1975) [on rehearing en banc, Court of Appeals reversed panel and affirmed the grant of a preliminary injunction restraining appellants from enforcing copyright, slip. op. p. 3202, dated (April 12, 1976)]; Roth Greeting Cards v. United Car Co., 429 F. 2d 1106 (9th Cir. 1970); Welles v. Columbia Broadcasting System, Inc., 308 F. 2d 810 (9th Cir. 1962). The instant copyrights attempt to protect the method of betting and are invalid.

Alternatively, should the complaint be interpreted as an infringement of the expression of the betting method, rather than the method itself, the court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by defendants.

The limited copyright of the expression of the methods of betting was not infringed."

On April 21, 1976, the Court of Appeals affirmed the judgment on the opinion of the District Court Judge (A7a).

ARGUMENT

THE COMPLAINT WAS PROPERLY DISMISSED. THE PLAINTIFF'S SUGGESTION OF A METHOD OF BETTING THE TRI-3, AND THE TRI-3 DOUBLE IS AT MOST AN IDEA AND IS NOT COPYRIGHTABLE.

(1)

The Court of Appeals properly affirmed the District Court's dismissal of the plaintiff's complaint which alleged four counts

of copyright infringement, each separately, directly against the four defendants. The plaintiff alleged that he had registered with the United States Copyright Office two methods of betting called TRI-3 and TRI-3 Double and that, after registration, the defendants used these ideas and infringed plaintiff's copyrights.

Copyright registration confers no right at all to the conception reflected in the registered subject matter. A copyright gives no exclusive right to the act of idea disclosed; protection is given only to the expression of the idea not the idea itself. Mazer v. Stein, 347 U.S. 201, 217 (1954); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F. 2d 738, 740 (9th Cir., 1971). See also, Roth Greeting Cards v. United Card Comp., 429 F. 2d 1106, 1109 (9th Cir., 1972); Nichols v. Universal Pictures Corp., 45 F. 2d 119, 121

121 (2d Cir., 1930), cert. den. 282 U.S. 902 (1930).

In Mazer v. Stein, supra, 347 U.S. 201 (1953), this Court, after reviewing the history of the copyright statutes and the scope of protection the statutes were intended to confer, stated (p. 217):

> "Unlike a patent, a copyright gives no exclusive right to the act disclosed; protection is given only to the expression of an idea - not the idea itself. Thus in Baker v. Selden, 101 U.S. 99, the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a similar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings. The distinction is illustrated in Fred Fisher, Inc. v. Dillingham, 298 F. 145, 151, when the court speaks of two men, each a perfectionist, independently making maps of the same territory. Though the maps are identical each may obtain the exclusive right to make copies of his own particular map and yet neither will infringe the others copyright."

Mazer and Baker v. Seldon, cited in the Mazer decision, establish the distinction between writings describing plans, methods or systems, which writings are subject to copyright protection, and the plans, methods or systems themselves, which are not subject to protection. This distinction was recognized in Briggs v. New Hampshire Trotting and Breeding Assn., Inc., 191 F. Supp. 234 (D.N. Hamp., 1960), which involved facts similar to the instant case. In Briggs, the plaintiff alleged that he was the author of a brochure which set forth a betting system and a method to process the betting system by using I.B.M. Machines. The plaintiff alleged that the defendant had introduced a similar system of betting in violation of his copyright and that the defendant had engaged in unfair competition. The District Court dismissed the complaint on

the ground, among others "that the statutes and court decisions give no protection by copyright to sports, games or similar systems as distinguished from publications describing them." 191 F. Supp. at pp. 236-237.

Prior to this proceeding, the plaintiff in the instant case commenced an action, alleging the same causes of action as alleged here, against the New Hampshire Jockey Club, Inc., and other defendants. On October 6, 1975, the District Court for New Hampshire, relying on Briggs v. New Hampshire Trotting and Breeding Association, Inc., 191 F. Supp. 234 (D.N. Hamp. 1960), dismissed the complaint. Salvucci v. New Hampshire Jockey Club, Inc., Dist. Ct., New Hampshire, Docket Nos. 75-223 and 75-224 affd. ___ F. 2d __ (1st Cir., 1976), docket number 75-1434, opinion dated March 1, 1976 (45-46).

The District Court had also properly found that, even if the plaintiff's method of betting could be protected as a form of expression under the copyright statute, the method was not used by the defendants. The plaintiff attached to his complaint a copy of two pages of a booklet of rules published by an off-track betting corporation. These two pages were alleged to be proof of each defendant's infringement. The pages describe the betting method called "The Triple." The description of "The Triple" is similar to that contained in the Rules of the New York State Racing and Wagering Board (61, 72). These descriptions are not similar to plaintiff's description. Such descriptions do not satisfy plaintiff's burden of proof, which, in a case where the subject matter involved allows

little variation in the form of its expression, requires a showing of appropriation in exact form of plagiarism. See Continental Cas. Co. v. Beardsley, 253 F. 2d 702, 705 (2d Cir., 1958), cert. den. 358 U.S. 816 (1958); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F. 2d 738, 742 (9th Cir., 1971).

(3)

Plaintiff alleged in his complaint that the defendants, in using his "Big Triple" idea had "been engaging in unfair trade practices and unfair competition against plaintiff to plaintiff's irreparable damage" (4). To sustain a cause of action for unfair competition or unfair trade practices, the plaintiff must show that the use of his idea by the defendants had a destructive effect on the plaintiff's competitive position. See Hygenic Specialties Co. v. H.G.

Salzman, Inc., 302 F. 2d 614, 620 (2d Cir., 1962); Blisscraft of Hollywood v. United Plastics Co., 294 F. 2d 694, 698 (2nd Cir., 1961); Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836, 848 (E.D.N.Y., 1971).

Since the complaint does not allege that the plaintiff is in competition with the New York City Off-Track Betting Corporation or any of the other defendants, the plaintiff cannot establish that his competitive position was impaired by the defendants' actions and, therefore, he is not entitled to any relief based on that cause of action.

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

October 29, 1976.

Respectfully submitted,

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